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July 25, 2024

Re: FuboTV Inc. et al. v. The Walt Disney Company et al., No. 24-cv-01363

Dear Judge Garnett:

I write on behalf of all Defendants in the above-captioned matter. Pursuant to Rule I.D.3 of Your Honor's Individual Rules and Practices, Defendants The Walt Disney Company, ESPN, Inc., ESPN Enterprises, Inc. and Hulu, LLC (the "Disney Defendants" or "Disney"), Fox Corporation ("Fox") and Warner Bros. Discovery, Inc. ("WBD") (together, "Defendants") in the above-captioned matter respectfully request leave to file under seal (i) portions of the Opposition to Plaintiffs' Motion for Preliminary Injunction (the "Opposition"); (ii) portions of the Declaration of J. Wesley Earnhardt in Support of Defendants' Opposition (the "Earnhardt Declaration"); (iii) and certain of the exhibits thereto. Fubo and each of the third parties has consented to the Protected Material being filed under seal.

Consistent with Your Honor's Individual Rule I.D.3.iii, the above mentioned documents have been contemporaneously filed under seal on ECF as "Attorneys' Eyes Only" and electronically related to this letter-motion.

First, each of the documents requested to be filed under seal or redacted has been designated "Highly-Confidential Attorney Eyes Only" or "Highly Confidential Outside Attorney's Eyes Only" by FuboTV Inc. and FuboTV Media Inc. (together, Plaintiff or Fubo), Defendants or third parties Echostar Corporation, DirectTV, LLC, and NBCUniversal Media, LLC. As set forth in the Amended Stipulated Protective Order entered by the Court on July 8, 2024, "[a]ll Protected Material filed with the Court, and all portions of pleadings, motions, or other papers filed with the Court that disclose such Protected Material, shall be filed under seal and kept under seal until further order of the Court." (Dkt. 218 ¶ 21.)

Second, sealing the below exhibits is appropriate in light of the presumption of public access to judicial documents. The Second Circuit has held that "notwithstanding the presumption of [public] access under both the common law and the First Amendment", filed documents may be kept under seal if "sealing is necessary to preserve higher values and only if the sealing order is narrowly tailored to achieve that aim". *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 124 (2d Cir. 2006). "Business secrecy" is a well-established factor "outweigh[ing] the presumption of public access." *Lexington Furniture Indus., Inc. v. Lexington Co., AB*, No. 19-cv-6239 (PKC) 2021 WL 1143694, at *2 (S.D.N.Y. Mar. 24, 2021)

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(citing *United States v. Amodeo*, 71 F.3d 1044, 1051 (2d Cir. 1995); see also Fed. R. Civ. P. 26(c)(1)(G) (“The court may, for good cause, issue an order . . . requiring . . . confidential . . . commercial information not be revealed . . .”). Courts have frequently found that a person’s interest in protecting sensitive business information outweighs the public’s interest in accessing such materials, and, as such routinely permit parties to file such materials under seal. See, e.g., *Lexington Furniture Industries*, 2021 WL 1143694, at *2 (finding that the proposed sealing was appropriate because “protecting the parties’ sensitive business information, outweighs the public’s right to access this information” and the sealing was “narrowly tailored to protect only this sensitive business information”). As set forth below, each of the exhibits sought to be sealed meet that standard.

The exhibits fall into five broad categories: (i) highly confidential agreements; (ii) highly confidential internal and proprietary financial analyses, marketing data and business strategy; (iii) correspondence concerning highly confidential material; (iv) excerpts of highly confidential deposition testimony; and (v) expert reports containing each category of highly confidential information identified above, each of which reflects sensitive business information that should be sealed.

Agreements

The exhibits below are highly confidential business agreements that concern agreements among the parties and with third parties related to licensing video content. When the disclosure of “confidential business terms”, such as those detailed in these exhibits, would result in “competitive harm” to a party, such as a “disadvantage . . . in future . . . negotiations with third parties”, this Court has agreed to seal such documents, including in this proceeding. *News Corp. v. CB Neptune Holdings, LLC*, 2021 WL 3409663, at *2 (S.D.N.Y Aug. 4, 2021); Dkt. 147 at 2 (granting motion to seal for “documents that concern Fubo’s carriage agreements with Defendants”). The Court has granted a motion to file under seal a number of these agreements (see e.g., Dkt. 90-1 (Exhibit 89), Dkt. 90-2 (Exhibit 41), Dkts. 90-3 to 90-5 (Exhibit 100) and Dkt. 90-7 (Exhibit 42) which were attached to the declaration of Todd Mathers filed in support of Fubo’s Motion for Preliminary Injunction.) (Dkt. 147 at 2 (granting the Fubo PI Motion to Seal)).

These exhibits contain sensitive terms that affect the Parties’ ongoing relationship with one another and with third-parties and should therefore remain confidential. *Rubik’s Brand Ltd. v. Flambeau, Inc.*, 2021 WL 1085338, at *1 (S.D.N.Y Mar. 22, 2021) (granting motion to seal documents containing the terms of confidential trademark licensing agreements). An order from this Court to seal these exhibits would be narrowly tailored to prevent potential competitive harms from the disclosure of Parties’ confidential business terms and to protect the ongoing commercial relationship between those parties.

Exhibit #	Bates number
19	TWDC_FUBO_00077161
23	TWDC_FUBO_00079295
39	TWDC_FUBO_00080289
40	FOX-020490
41	TWDC_FUBO_00082294
42	FOX-022688
43	TWDC_FUBO_00082094
44	FOX-021782
54	TWDC_FUBO_00123253

Exhibit #	Bates number
56	WBD-00029182
65	FUBO_0100573
73	FUBO_0168464
74	FUBO_0101226
75	FUBO_0101244
76	FUBO_0168358
77	FUBO_0165222
78	FUBO_0100831
79	FUBO_0101090
80	FUBO_0100567
82	FUBO_0100712
83	FUBO_0101468
84	FUBO_0101105
85	FUBO_0101209
86	FUBO_0168490
87	FUBO_0168496
88	FUBO_0168510
89	FUBO_0001782
92	WBD-00025897
93	WBD-00025943
94	WBD-00025946
95	FUBO_0139052
96	WBD-00025886
97	WBD-00025951
98	WBD-00025966
99	WBD-00025968
100	FOX-022764
101	FOX-022876
132	FOX-065060
136	DTV-Fubo-0000003882
137	DTV-Fubo-0000003428
138	DTV-Fub0000003618

Internal and Proprietary Financial Analyses, Marketing Data and Business Strategy

The exhibits below include decks, internal emails and models that reflect confidential and proprietary financial analyses marketing data and business strategies of the sort that courts routinely seal. *See Sullivan Mktg., Inc. v. Valassis Commc'ns, Inc.*, 1994 WL 177795, at *2 (S.D.N.Y. May 5, 1994) (“[K]nowledge of [a party’s] pricing and marketing plans would give its competitors an unwarranted advantage in the market.”); *see also Skyline Steel, LLC v. PilePro, LLC*, 101 F. Supp. 3d 394, 412–13 (S.D.N.Y. 2015) (sealing “highly confidential sales information, including pricing information” as well as information “revealing confidential negotiations” with a customer); *Kewazinga Corp. v. Microsoft Corp.*, 2021 WL 1222122, at *3 (S.D.N.Y. Mar. 31, 2021) (sealing confidential research and development information, marketing plans, revenue information, pricing information); *GoSMiLE, Inc. v. Dr. Jonathan Levine, D.M.D. P.C.*, 769 F. Supp. 2d 630, 649–50 (S.D.N.Y. 2011) (granting motion to seal internal financial information and budgets).

The Court has granted motions to seal “to protect the commercially sensitive business information of Fubo and the Defendants”. (Dkt. 147 at 3.) Likewise, the documents below merit sealing.

Exhibit #	Bates number
2	FUBO_0134076
3	FUBO_0097919
8	DTV-Fubo-000002932
14	FOX-065015
15	TWDC_FUBO_00077313
16	TWDC_FUBO_00043763
17	TWDC_FUBO_00016675
18	TWDC_FUBO_00016601
20	TWDC_FUBO_00037426
24	FOX-057328
25	WBD-00023204
26	TWDC_FUBO_00106479
27	TWDC_FUBO_00046715
28	TWDC_FUBO_00079431
29	NBC-00000167
30	ECHO0002954
31	FUBO_0150388
32	FUBO_0003021
33	WBD-00023279
34	TWDC_FUBO_00105863
45	TWDC_FUBO_00090836
46	TWDC_FUBO_00004083
55	TWDC_FUBO_00037555
58	DTV-Fubo-000003283
59	ECHO0003272
61	FOX-043036
63	FUBO_0063681
66	FUBO_0033731
71	FUBO_0022021
72	FUBO_0146913
109	FUBO_0011001
110	FUBO_0006885
68	FUBO_0123831
67	FUBO_0079043
81	FUBO_0078442
107	FUBO_0073002
114	FUBO_0132713
117	DTV-Fubo-000002345
118	April 9, 2024 Declaration of Alberto Horihuela in Support of Plaintiffs’ Motion for Preliminary Injunction ¹

¹ The Court granted Fubo’s motion to seal the declaration of Alberto Horihuela. (Dkt. 147 at 2 (granting the Fubo PI Motion to Seal)).

Exhibit #	Bates number
119	TWDC_FUBO_00055577
121	FUBO_0147699
123	FUBO_0141629
124	April 9, 2024 Declaration of John Janedis in Support of Plaintiffs' Motion for Preliminary Injunction ²
125	FUBO_0022960
126	TWDC_FUBO_00123202
127	April 9, 2024 Exhibit 1 to the Declaration of John Janedis in Support of Plaintiffs' Motion for Preliminary Injunction ³
128	FUBO_0147659
129	FUBO_0032897

External Correspondence

The exhibits below consist of email correspondence both between Fubo and the Defendants and email correspondence with third parties. These emails have been designated highly confidential and contain commercially sensitive and confidential business information. For example, a number of these emails record the negotiations between the parties and therefore concern the terms of a sensitive business agreement and the parties' ongoing commercial relationship. Documents that reveal those terms, and the process by which the parties reached those terms, also merit sealing. *See PDV Sweeny, Inc. v. ConocoPhillips Co.*, 2014 WL 4979316 at *2 (S.D.N.Y. Oct. 6, 2014) (applying *Lugosh* standard to conclude that sealing of documents concerning the parties' "ongoing commercial relationship" to supply materials was appropriate "on the basis of their containing sensitive commercial information affecting the parties' ongoing relationship"). The Court in this matter has previously granted motions to seal on this basis. (*See* Dkt 147 at 3; Dkt 195.)

Exhibit #	Bates number
48	TWDC_FUBO_00088564
49	TWDC_FUBO_00086036
51	TWDC_FUBO_00087310
52	TWDC_FUBO_00084779
53	TWDC_FUBO_00090523
62	FUBO_0041794
108	FUBO_0017520
90	FUBO_0106558
91	FUBO_0104611
111	FUBO_0003795
122	FUBO_0003702

² The Court granted Fubo's motion to seal the declaration of John Janedis. (Dkt. 147 at 2 (granting the Fubo PI Motion to Seal)).

³ *Id.*

Excerpts of Deposition Testimony

Defendants respectfully request leave to file under seal the below exhibits, which are excerpts of deposition testimony that have been designated by the parties as highly confidential. Defendants seek to narrowly tailor their sealing order by requesting leave to file under seal only limited excerpts that contain the deposition testimony cited in the Opposition. The deposition testimony concerns sensitive commercial business information, including specific terms of carriage agreements, negotiations between the parties, proprietary financial analyses and internal business strategy, such as the material for which sealing is sought above. The exhibits contain substantively similar information as to that reflected in the portions of Fubo's complaint which, as noted above, this Court has sealed. To protect the sensitive business information of the parties, Defendants respectfully request to file the exhibits below under seal. *See In re Zimmer M/L Taper Hip Prosthesis or M/L Taper Hip Prosthesis with Kinectiv Tech. & Versys Femoral Head Prod. Liab. Litig.*, 2021 WL 4706199, at *3 (S.D.N.Y. Oct. 8, 2021) (sealing excerpt from deposition transcript discussing confidential business information).

Exhibit #	Deponent
1	Justin Warbrooke
5	James Trautman
6	Eric Shanks
7	David Gandler
10	James Pitaro
11	John Janedis
12	Peter Distad
13	John Nallen
21	Bruce Campbell
22	Dan Fox
36	Jonathan Orszag
37	David Espinosa
38	Robert Iger
47	Justin Connolly
57	Scott Miller
60	Gary Schanman
64	Todd Mathers
69	Benjamin Grad
70	Alberto Horihuela
103	Salvatore Marchesano
104	Ameet Padte

Expert Reports

Furthermore, Defendants respectfully request leave to file under seal the declarations of the Parties' respective experts. These exhibits reference and discuss Defendants' and Fubo's commercially sensitive proprietary information, including internal projections and strategy, as well as terms of confidential carriage agreements. *See Skyline Steel* 101 F. Supp. 3d at 412–13; *Kewazinga Corp.* at *9. As the declarations of Defendants' experts discuss many of the exhibits above, Defendants request leave to file Exhibits 134 and 135 under seal in order to protect the highly confidential business information contained therein. Defendants request leave to file

under seal the excerpts of Plaintiffs' updated expert declarations which Defendants cite in the Opposition. The Court granted Plaintiffs' request to file their expert declarations under seal. (Dkt. 147 at 2.) Defendants request to file under seal excerpts of Plaintiffs' experts' updated declarations because they are not presently on the Court's docket.

Exhibit #	Document
133	July 10, 2024 Expert Declaration of Edwin S. Desser
134	July 19, 2024 Rebuttal Expert Declaration of Michael D. Whinston, Ph.D
139	Excerpt of the June 24, 2024 Updated Expert Declaration of James Trautman
140	Excerpt of the June 24, 2024 Updated Expert Declaration of Jonathan Orszag

Motion and Declaration

Finally, for the same reasons as above, the Defendants respectfully request the Court order the portions of the Opposition and Earnhardt Declaration that quote or reference the exhibits sought to be sealed as well. *See fuboTV, et al v. The Walt Disney Company, et al.*, No. 1:24-mc-00070 (S.D.N.Y. filed Feb. 20, 2024). It is necessary that such information, which includes pricing information and other terms in the Parties' carriage agreements, continued to be sealed to "protect proprietary and commercially sensitive information". *See Optima Media Grp. Ltd. v. Bloomberg L.P.*, 2018 WL 1587074, at *8 (S.D.N.Y. Mar. 28, 2018).

Sincerely,

/s/ J. Wesley Earnhardt
J. Wesley Earnhardt

The Honorable Margaret M. Garnett
United States District Court for the Southern District of New York
Thurgood Marshall United States Courthouse
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cc: All counsel of record

VIA ECF